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No. 124

In the Supreme Court of the United States

OCTOBER TERM, 1968

JOSEPH AIUPPA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Now comes the Petitioner, Joseph Aiuppa, by his attorneys, Maurice J. Walsh and John Powers Crowley, in reply to the brief of the United States in opposition to the Petition for Certiorari, and states as follows:

IN RESPONSE TO EAVESDROPPING DISCLOSURE MADE FOR THE FIRST TIME IN THE "BRIEF OF THE UNITED STATES IN OPPOSITION" TO THE PETITION FOR CERTIORARI.

Although this case was tried in the United States District Court for Kansas at Kansas City, Kansas, and appealed to the Tenth Circuit Court of Appeals, reversed and re-tried in the District Court at Fort Scott, Kansas, appealed and affirmed, it is only in its Brief in Opposition to the Petitioner's Writ of Certiorari, that the United States for the first time states: "We have the duty, however, to advise the Court that on December 5, 1961, prior to the commission of the offenses here involved, Petitioner was overheard by an electronic device installed by trespass in a commercial establishment."

No disclosure of any kind of these statements of the Petitioner has even been made by the United States, or is made to the Petitioner by its revelation in this Court. The Government curtly suggests that this Court deny Certiorari and remit the Petitioner to the remedies of a post-conviction defendant.

This Court has, on several occasions, refused to follow almost identical suggestions by the Government, and no reason is given by the Government to induce this Court to alter the course taken in *Black* v. *United States,* 385 U.S. 26, *Hoffa* v. *United States,* 387 U.S. 231, *O'Brien* v. *United States,* 386 U.S. 345, *Granello* v. *United States,* 386 U.S. 1019, and *Schipani* v. *United States,* 385 U.S. 372.

It is urged that the Government makes no representation that the overhearing on December 5, 1961 is the only overhearing of the Petitioner. It makes no representation concerning any electronic eavesdropping on his attorney,

or his wife, who was charged as a defendant in the offense, or upon any of the witnesses or original co-defendants. No revelation is made to this Court as to the "general" nature of the eavesdropped material, or of the nature of the trespass, that is, whether housebreaking, wiretapping, or radio devices. No revelation is made as to whether the conversations overheard were preserved on the tapes, or whether, as is usually the case, the tapes were destroyed, and the evidence remaining is an editorialized version by a government agent of the fruits of his illegal trespass upon a so-called "log".

The Petitioner, under the post-conviction procedure, prescribed by the Solicitor General as the appropriate relief, would be denied the ordinary due process of a motion for the return of the property (conversations) seized and their suppression as evidence, and of a motion for production of his statements under Rule 16(a) as it became effective in 1966.

Certainly, the illegal trespasser against the Fourth Amendment rights of the Petitioner, should not now be elevated to guardianship of illegal evidence, expensively obtained under the guise that it is of no value, and on the claim of solicitude for privacy.

The Petitioner respectfully urges that the Court vacate the judgment and remand for a new trial so that the Petitioner's rights under Rules 16(a) and 41 of the Federal Rules of Criminal Procedure and due process thereunder can be duly administered and protected.

It is further respectfully suggested that *in camera,* or as in this case, ex parte examination of evidence obtained by illegal trespass in violation of the Fourth Amendment rights is not due process of law and is not consistent with what this Court has said is our adversary system.

REPLY TO THE POINTS MADE IN THE "BRIEF OF THE UNITED STATES IN OPPOSITION" TO THE PETITION FOR CERTIORARI.

1. In attempting to argue that the evidence introduced through the testimony of the witness Williams was not tainted by virtue of the illegal search and seizure, the Solicitor argues that, "the Government's knowledge was based on an independent source and was not the product of the subsequent illegal search." (Br. p. 4). This statement is simply not supported by the record.

At the hearing on the motion to suppress, the government agent testified that he did not know what was in the car until informed of the results of the illegal search (App. 27), and further testimony disclosed that Williams was not arrested or interviewed *until after the illegal search* confirmed a suspicion that there were dead birds in the store in Kansas, and in the car of Aiuppa and his wife when searched in Chicago, Illinois. (App. 166-167). Therefore, it is clear that the testimony of Williams was a lead obtained from an illegal search and seizure, and his testimony should have been stricken. The government, at no stage of the proceeding, has made any effort to *prove* its evidence untainted. It merely presumes it and invites this Court to presume irrationally and to infer without proof.

Further, the Solicitor in reply to this point of argument ignores another portion of the question raised: What is the burden upon the Government to prove that its evidence was not obtained as the result of a lead emanating from an illegal search and seizure? The Solicitor apparently relies upon alleged indefinite information given by an unknown informant prior to the illegal search complained of here.

Both the District Court, and the United States Court of Appeals, sitting in review of the District Court, completely ignored the mandate of this Court in *Chapman* v. *California*, 386 U.S. 18, 23, 24, to the effect that the sufficiency of evidence indicating guilt cannot be the basis for affirming the conviction unless the reviewing court can say beyond a reasonable doubt that the tainted evidence did not contribute to the conviction. Further, it is the burden of the government to show that the evidence it offers is not tainted by admitted illegality.

In the prosecution of this case, both the prosecutor in the District Court, who represented the Government on appeal before the Tenth Circuit, and the Solicitor General, who represents the government here, have ignored totally the effect of the *Chapman* case which laid down their burden as being that the government must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman* v. *California*, 386 U.S. 18, 24.

We respectfully submit that a clear violation of the defendant's Fourth Amendment rights existed, and the burden of the Government was to prove that its evidence was not a tainted product of a lead emanating from the illegal search and seizure, beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18. We further submit that this Court should issue its Writ of Certiorari to determine whether testimony of a witness, obtained from a lead derived from an illegal search, is the fruit of a poisonous tree. This question was left open in *Harrison* v. *United States*, 392 U.S. 291, fn. 9, and should be resolved here. C.f. *Wong Sun* v. *United States*, 371 U.S. 471, 485, 486, 487; *Nueslein* v. *D.C.* 115 F.2d 690.

2. In answer to the contention of the petitioner that his conviction violates due process since it was not supported by the evidence, the Solicitor relies upon the well-

established principle of *Glasser* v. *United States,* 315 U.S. 60, 80, that the jury may draw reasonable inference from the facts proved, and on appeal the evidence and inferences must be construed most favorable to the Government. We do not contest this well-established principle of law. However, the Solicitor attempts to raise the "assumptions" of the witness Williams (App. 161, 164-165) that the petitioner possessed more than the legal limit to the level of inferences. We respectfully submit that an inference is permissible only when there is an established fact, but an assumption operates without a fact. We submit that to "assume" the petitioner's guilt, as did the Court of Appeals (App. A. p. 4) in this case, violates due process.

3. It is impossible to reconcile the position of the Solicitor in relation to prejudice in news reporting in this case with his position in *Janko* v. *United States,* 366 U.S. 716. The news articles which were the basis for the petitioner's motion to interrogate the jurors, and which had been purchased by counsel for the petitioner in the streets of Fort Scott, Kansas, were, in the words of the Court of Appeals, "to be sure prejudicial." (App. A. 11). The articles (App. 280-283) referred to the petitioner as a gangland figure, referred to the petitioner's possession of 500 doves and to the fact that his original conviction for the possession of these doves had been reversed by the Tenth Circuit because of an illegal search and seizure.

In confessing error in almost identical circumstances in *Janko* v. *United States,* 366 U. S. 716, the Solicitor stated:

> "The nature of the newspaper article in question, especially in its reference to the outcome of the prior trial and to petitioner as a 'former convict' and a 'former employee of East Side rackets boss Frank (Buster) Wortman'—a recipient of considerable adverse publicity in the St. Louis press—was such as to

raise substantial doubt as to whether if it did in fact reach the jurors the inadmissible prejudicial information could be wiped out of a juror's mind. *Marshall* v. *United States,* 360 U.S. 310.

"In the light of the character of the extraneous information contained in the article, we think that, before the jury was finally discharged, *the trial court should have assured itself as to whether the jurors had in fact read the article.*" (Emphasis supplied).

We respectfully submit that this case merits the issue of this Court's Writ of Certiorari on this question alone in order to set down firm guidelines to be followed by the various district courts throughout the United States when prejudicial news articles appear during a trial. See also *Silverthorne* v. *United States,* No. 21,221, C.A. 9, Decided August 27, 1968.

4. The Solicitor does not dispute the contention of the petitioner that there is a conflict in the circuits over the permissibility of allowing a jury to separate, without supervision, during its deliberations. However, the Solicitor urges this Court not to adopt the absolute rule against separation laid down in the Seventh Circuit, *United States* v. *D'Antonio,* 342 F.2d 667, and *United States* v. *Panczko,* 353 F.2d 676, on the basis that the law of the Seventh Circuit Court of Appeals, whose major business comes from Chicago, should be different than law in the Tenth Circuit in which this trial was held. We submit that such a provincial attitude by the Solicitor is not warranted in this case.

The Constitution and the statutes enacted by Congress do not provide for any different application of due process and fair trial standards between metropolitan area and rural area residents.

The conflict in the circuits presented in this case, should not and cannot be resolved fairly or rationally, by resort to population. The question of the separation of the jury, during deliberations, is so crucial to the uniform administration of justice that this Court should issue its Writ of Certiorari to resolve this conflict between the Seventh and Tenth Circuit Courts of Appeal.

5. The issue presented under this question: whether a court may, over specific objections, instruct the jury that a defendant cannot be "compelled" to testify, and no presumption of guilt and no inference of any kind may be drawn from the "failure" of a defendant to testify has been left unresolved by prior opinions of this court. We respectfully submit that to so instruct the jury over the objection of a non-testifying defendant is as violative of the Fifth Amendment as the statutory permissiveness condemned by this court in *Griffin* v. *California*, 380 U.S. 609 and *Chapman* v. *California*, 386 U.S. 18, and that this issue is sufficiently important to the uniform administration of justice in the federal courts so as to require this court to issue its Writ of Certiorari, to compel compliance with decisions of this Court.

CONCLUSION

For the reasons stated herein, and in the Petition for Writ of Certiorari, this Court should issue its Writ of Certiorari to review the decision below.

Respectfully submitted,

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